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**IN THE  
COURT OF APPEALS OF INDIANA**

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CAROLYN CLINARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0610-CR-482
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE HENDRICKS SUPERIOR COURT  
The Honorable David H. Coleman, Judge  
Cause No. 32D02-0509-FB-15

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**June 22, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Carolyn Clinard appeals her convictions and sentences for Operating While Intoxicated (OWI) with a Controlled Substance or Metabolite Causing Death,<sup>1</sup> a class B felony, and OWI Resulting in Death,<sup>2</sup> a class C felony. Specifically, Clinard raises nine issues: (1) whether the trial court committed reversible error when it denied Clinard's pretrial motion for a continuance, (2) whether there was sufficient evidence to sustain Clinard's convictions, (3) whether Clinard's convictions violate the principle of double jeopardy, (4) whether Clinard's trial counsel was ineffective, (5) whether Indiana Code section 9-30-5-5(b) is constitutional, (6) whether the trial court improperly conducted the sentencing hearing, (7) whether the trial court erred by not having Clinard's aggravating sentencing factors determined by a jury, (8) whether the trial court improperly determined the aggravating and mitigating factors, and (9) whether the trial court erred by failing to provide Clinard with good time credit for her pretrial home detention. Finding that Clinard's convictions violate the principle of double jeopardy but finding no other error, we affirm in part, reverse in part, and remand this cause to the trial court with instructions that it vacate Clinard's class C felony OWI resulting in death conviction.

### FACTS

Shortly after noon on August 6, 2005, Clinard was driving a red Aerostar minivan on Interstate 74 near Brownsburg. Pamela Keller was a passenger in Clinard's vehicle. Sally

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<sup>1</sup> Ind. Code § 9-30-5-5(b).

<sup>2</sup> I.C. § 9-30-5-5(a).

Wethington was driving a Toyota Tercel in front of Clinard. Terry Apley was driving the vehicle behind Clinard on the interstate.

As Apley was driving, he observed Clinard's vehicle "bouncing, going from side to side bouncing up and down, side to side." Tr. p. 28. Apley decided to pass Clinard because he assumed that her vehicle had a suspension problem. While passing the vehicle, Apley observed Clinard looking down as if she had dropped something. About two miles later, Apley looked in his rearview mirror and "saw [Clinard's van] doing about six barrel rolls." Id. at 30. Paula Schober, who was traveling in the opposite direction on the interstate, observed Clinard's vehicle "clip[]" Wethington's vehicle, causing Wethington's vehicle to "fishtail a little bit," flip at least once, and come to rest on the other side of the interstate. Id. at 40.

Emergency medical personnel arrived at the scene and pronounced Wethington dead. Clinard's primary medic was Jerry Harder, a firefighter paramedic with the Brownsburg Fire Territory. Clinard kept asking Harder "what was going on." Id. at 119. Harder immediately noticed that Clinard's eyes were dilated and that she had numerous spots on her arms and legs, which indicated to Harder that Clinard used methamphetamine. Clinard admitted to Harder that she had taken Klonopin.

Keller—Clinard's passenger—was treated for minor injuries. Clinard was transported to Wishard Hospital, where she submitted to a blood draw and agreed to talk to Brownsburg Police Officer Ginnie Wing. Clinard told Officer Wing that she remembered driving on the interstate but that "the next thing she knew that the van she was driving was flipping over."

Id. at 58. Clinard also told Officer Wing that she suffered from bipolar disorder, sometimes hallucinates, and may have “blacked out” before the accident. Id. at 59. Clinard acknowledged that she had taken Klonopin and Topamax that morning. Clinard also told Officer Wing that she “was trying to get off of methamphetamines [sic]” but that she “had done a line the day before.” Id. at 59-60.

The results from Clinard’s blood draw indicated that methamphetamine, amphetamine, and small amounts of marijuana, morphine, and hydromorphone were present in her system. Dr. Peter Method, the acting director of the Indiana Department of Toxicology, testified at trial that the level of various drugs found in Clinard’s blood sample demonstrated “likely significant impairment from several different sources.” Id. at 164.

On September 19, 2005, the State charged Clinard with class B felony OWI with a controlled substance or metabolite causing death and class C felony OWI resulting in death. A bench trial was held on July 27, 2006, and the trial court found Clinard guilty as charged. A sentencing hearing was held on September 26, 2006, and the trial court sentenced Clinard to fifteen years imprisonment with five years suspended to probation. The sentencing order states that the sentence for class C felony OWI resulting in death “merged into” the sentence for class B felony OWI with controlled substance or metabolite causing death, but the trial court did not actually vacate the OWI resulting in death conviction. Appellant’s App. p. 243. Clinard now appeals.

## DISCUSSION AND DECISION

### I. Pretrial Motion for Continuance

On July 20, 2006, the State filed an amended toxicology report with the trial court. Clinard filed a motion to continue on July 21, 2006, which the trial court denied on July 24, 2006. That same day, Clinard filed a motion to reconsider, which the trial court subsequently denied. Clinard argues that the trial court erred by denying her motion for a continuance because the amended toxicology report was “completely different than any results previously furnished to the defendant by the State.” Appellant’s Br. p. 6.

Indiana Code section 35-36-7-1 provides for a continuance upon a proper showing of an absence of evidence or the illness or absence of the defendant or a witness. Rulings on a non-statutory motion for continuance—such as Clinard’s—lie within the discretion of the trial court and will be reversed only for an abuse of discretion that results in prejudice.

Maxey v. State, 730 N.E.2d 158, 160 (Ind. 2000).

On appeal, the State argues that the trial court did not abuse its discretion by denying Clinard’s motion because the amended toxicology report corrected an obvious typographical error. As the State noted in its response to Clinard’s motion, the amended toxicology report

was identical to the last previously submitted Amended Toxicology Report except that the results under the Sub-Category Heading of Amphetamines were lined up correctly on the right hand side of the report. The previously submitted report had the results mis-aligned [sic] so that the Sub-Category Hearing of Amphetamines appeared to have a result. This was an obvious printing mistake.

Appellant’s App. p. 104.

We agree with the State that the trial court did not abuse its discretion by denying Clinard’s motion for a continuance. Aside from an apparent scrivener’s error, Clinard has not demonstrated how the amended toxicology report materially varied from the previously

provided reports in a way that prejudiced her. Therefore, we cannot conclude that the trial court abused its discretion by denying her motion.

## II. Sufficiency

Clinard argues that there was insufficient evidence to sustain her conviction for OWI with a controlled substance or metabolite resulting in death.<sup>3</sup> Specifically, Clinard argues that insufficient evidence was presented to show that her intoxication was the cause of the accident resulting in Wethington's death.

When considering a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Wright v. State, 828 N.E.2d 904, 905 (Ind. 2005). Instead, we will consider only the probative evidence and the reasonable inferences that may be drawn therefrom in support of the verdict. McHenry v. State, 820 N.E.2d 24, 126 (Ind. 2005). If the probative evidence and reasonable inferences could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, the conviction must be affirmed. Id. A conviction may be based entirely on circumstantial evidence. Franklin v. State, 715 N.E.2d 1237, 1241 (Ind. 1999). The circumstantial evidence need not overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference may reasonably drawn from it to support the verdict. Kriner v. State, 699 N.E.2d 659, 663 (Ind. 1998).

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<sup>3</sup> Clinard also challenges the sufficiency of the evidence supporting her OWI causing death conviction; however, we need not address that argument because, as detailed in Part III of this decision, we remand this cause to the trial court with instructions to vacate that conviction.

To convict Clinard of class B felony OWI with controlled substance or metabolite causing death, the State was required to prove beyond a reasonable doubt that Clinard was at least twenty-one years old and caused the death of another person while operating a vehicle with a schedule I or II controlled substance in her blood. I.C. § 9-30-5-5(b). As our Supreme Court has plainly stated, “[a]nalysis of this statute should focus on the driver’s acts. . . . If the driver’s conduct caused the injury, he commits the crime; if someone else’s conduct caused the injury, he is not guilty.” Abney v. State, 766 N.E.2d 1175, 1177 (Ind. 2002). While the State is not required to prove that the defendant’s intoxication directly caused the resulting injury, the State must prove that the defendant’s operation of a motor vehicle was a “substantial cause” of the resulting death, not merely a “contributing cause.” Id. We recently expounded on the Abney language:

The court in Abney restated the well-settled rule established in Micinski v. State, 487 N.E.2d 150, 154 (Ind. 1986), that the State must prove that the defendant’s conduct was a proximate cause of the victim’s injury or death. Id. at 1178. But “conduct,” in the context of Micinski and Abney, means the driver’s act of operating the vehicle, not the particular manner in which the driver operates the vehicle. Spaulding v. State, 815 N.E.2d 1039, 1042 (Ind. Ct. App. 2004).

Rowe v. State, No. 75A05-0607-CR-384, slip op. at 5 (Ind. Ct. App. May 31, 2007).

Clinard only challenges the sufficiency of the evidence presented to prove the causation element of the crime. Specifically, she argues that “[t]he State cannot rely merely upon a probability of causation linked to Clinard’s alleged consumption of a controlled substance or intoxication.” Appellant’s Br. p. 17. However, Clinard’s argument misses the point. As we emphasized when analyzing the defendant’s sufficiency claim in Rowe, “[a]s

Micinski makes clear, the test is not whether the presence of the metabolite in [the defendant's] blood caused the accident, but whether [the defendant] had the metabolite in her blood when she operated the [vehicle] and caused the [victims'] deaths." Rowe, slip op. at 5 (citing Micinski v. State, 487 N.E.2d at 154).

At trial, Brownsburg Police Department Sergeant John Depinet testified that he had reconstructed the accident based on an analysis of the scene and his expertise in accident reconstruction. He concluded that the damage to both vehicles indicated that the primary impact was between the front bumper of Clinard's van and the rear bumper of Wethington's vehicle. Tr. p. 79-82. A brake light recovered from Wethington's vehicle indicated that she was not braking at the time of the accident. Id. at 83. The accident caused both vehicles to roll, and Clinard's van rolled on its side and stopped in the roadway while Wethington's car flipped end-over-end, crossed the median, and came to a stop near an oncoming lane of traffic. Sergeant Depinet determined that the primary cause of the accident was that Clinard had followed Wethington's vehicle too closely. Id. at 86.

Turning to the presence of metabolite drugs in Clinard's system, Clinard admitted to Officer Wing that she had "done a line" of methamphetamine the day before the accident. Id. at 60. The toxicology report submitted at trial showed that Clinard had methamphetamine, amphetamine, and small amounts of marijuana, morphine, and hydromorphone in her system at the time of the accident. Ex. 47. Indiana Code section 35-48-2-4(d)(14) lists marijuana as a schedule I controlled substance and Indiana Code section 35-48-2-6 lists

methamphetamine, amphetamine, morphine, and hydromorphone as schedule II controlled substances.

In sum, the State presented sufficient evidence that Clinard had schedule I and II controlled substances in her system when she caused the accident that killed Wethington. Her argument to the contrary is a request for us to reweigh the evidence presented at trial—a practice in which we do not engage when analyzing the sufficiency of the evidence. Thus, we affirm Clinard’s conviction for OWI with a controlled substance or metabolite resulting in death.

### III. Double Jeopardy

Clinard argues that her convictions violate the principle of double jeopardy because both convictions arise from the same incident of criminal conduct, which resulted in the death of one person. Here, after finding Clinard guilty of each charged offense, the trial court entered judgment on both convictions. Appellant’s App. p. 14. While the trial court did not specifically impose a sentence for the lesser-included offense of OWI resulting in death, the abstract of judgment states that the “sentence” for that conviction “merged into” the ten-year executed sentence imposed for the OWI with controlled substance or metabolite causing death conviction. Id. (emphasis added).

The Double Jeopardy Clause in the Indiana Constitution, embodied in Article 1, section 14, provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded that this provision was intended to prohibit, among other things, multiple punishments for the same actions. Richardson v. State, 717 N.E.2d 32 (Ind.

1999). To show that two challenged offenses constitute the same offense under the actual evidence test, “a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002). Application of the actual evidence test requires the reviewing court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective, considering the jury instructions, argument of counsel, and other factors that may have guided the jury’s determination. Id.

To convict Clinard of class B felony OWI with controlled substance or metabolite causing death, the State was required to prove beyond a reasonable doubt that Clinard was at least twenty-one years old and caused the death of another while operating a vehicle with a Schedule I or II controlled substance in her blood. I.C. § 9-30-5-5(b). To convict Clinard of class C felony OWI resulting in death, the State was required to prove beyond a reasonable doubt that Clinard caused the death of another while operating a vehicle with a Schedule I or II controlled substance in her blood. I.C. § 3-30-5-5(a).

Here, both convictions stem from one episode of criminal conduct where twenty-one-year-old Clinard operated a vehicle while intoxicated, causing Wethington’s death. As the State essentially concedes, the same evidence was used to support each conviction. Our Supreme Court recently provided that “a defendant’s constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count.” Green v. State, 856 N.E.2d 703, 704 (Ind. 2006). Therefore,

although it was not improper for the trial court to find Clinard guilty of both offenses, it was improper for the trial court to enter judgment for both convictions even if it did not actually enter a sentence for the lesser-included offense. Therefore, we reverse the trial court's judgment in part and remand this cause to the trial court with instructions that it vacate Clinard's class C felony OWI causing death conviction.

#### IV. Constitutionality of Indiana Code section 9-30-5-5(b)

Clinard argues that her conviction for class B felony OWI with a controlled substance or metabolite causing death violates Article I, section 23 of the Indiana Constitution and the Fourteenth Amendment to the United States Constitution.<sup>4</sup> Specifically, Clinard argues that Indiana Code section 9-30-5-5(b) results in the disparate treatment of offenders over the age of twenty-one because it raises the offense described in 9-30-5-5(a) from a class C felony to a class B felony based solely upon the defendant being at least twenty-one years old. Clinard argues that “[a] person does not magically become ‘more aware’ or ‘enlightened’ upon attaining their 21st birthday” and that “[t]he disparate treatment is not reasonably related to the inherent characteristics of the adult population.” Appellant's Br. p. 28.

Initially, the State points out that Clinard asserts this issue for the first time on appeal. Generally, a defendant must raise a challenge to the constitutionality of a criminal statute in a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). Here, Clinard did not file a motion to

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<sup>4</sup> Clinard does not articulate a separate constitutional analysis for the alleged federal constitutional violation; consequently, she has waived her federal constitutional argument and we consider only her state constitutional claim. Kelver v. State, 808 N.E.2d 154, 156 (Ind. Ct. App. 2004).

dismiss on this issue, and she did not object to the constitutionality of the statute at trial. She has, therefore, waived this issue. See id.

Waiver notwithstanding, we recently addressed the constitutionality of Indiana Code section 9-30-5-5(b) based on a defendant's argument that the statute results in the disparate treatment of people at least twenty-one years old, which was an issue of first impression:

Article I, Section 23 of the Indiana Constitution states: “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” In Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994), our [S]upreme [C]ourt held that:

Article I, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded to the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

In considering such a constitutional challenge to a statute, we presume that the statute is valid, and we place the burden upon the challenging party to clearly overcome the presumption by a contrary showing. Kelver v. State, 808 N.E.2d 154, 156-57 (Ind. Ct. App. 2004). The party challenging the statute based on a purported improper classification must negate every reasonable basis for the classification. Id. All reasonable doubts must be resolved in favor of a statute's constitutionality. Id.

Here, the State points out that:

[a] rational distinction for treating [persons over twenty-one] differently than those under twenty-one years of age is the legislative determination that those who are twenty-one or older are more mature than those under twenty-one and should therefore be more accountable for their actions, particularly when it involves drinking or the use of drugs and driving. It is not unlike the legislative determination that

people in Indiana must be twenty-one or older in order to legally consume alcoholic beverages.

Brief of Appellee at 12. Rowe acknowledges that position, but rejects it, stating:

First, a younger person under twenty-one violating [Indiana Code Section] 9-30-5-5(a)(1) or (3)[, which results in a Class C felony unless the defendant has a prior conviction for operating while intoxicated within the past five years,] has already committed at least one other offense, to-wit: minor consuming. The statute actually benefits persons committing multiple offenses. Albeit, I.C. 9-30-5-5(b)(1) does contain the requirement of a higher alcohol concentration than I.C. 9-30-5-5(a)(1), which may justify the enhanced penalty more logically than the age of the offender. There is no difference between the requirements of I.C. 9-30-5-5(a)(2) and I.C. 9-30-5-5(b)(2) except the offender's age. This cannot withstand the constitutional analysis. A person eighteen, nineteen, or twenty years old understands the consequences of driving a vehicle after consuming too much alcohol or illegal drugs just as well as a person twenty-one or older.

Brief of Appellant at 15.

We are unpersuaded by Rowe's argument and hold that she has not rebutted the presumption of constitutionality. We agree with the State that a person over twenty-one years of age should be held to a higher standard when it comes to operating a motor vehicle under the circumstances contemplated under the statute. We reject Rowe's contention on this issue.

Rowe, slip op. p. 6-8.

Here, Clinard and the State present similar argument to those offered by the parties in Rowe. Ultimately, like the panel in Rowe, we find that Clinard does not overcome the presumptive constitutionality of Indiana Code section 9-30-5-5(b). In sum, Clinard's arguments do not convince us that the disparate treatment accorded by the challenged legislation is not reasonably related to the inherent characteristics distinguishing the two classes of people. For her challenge to succeed, Clinard "must negate every reasonable basis

for the classification.” Kelver, 808 N.E.2d at 157. However, Clinard does not carry that burden because it was reasonable for the legislature to determine that offenders under the age of twenty-one should receive leniency because they lack the maturity of offenders over the age of twenty-one who commit the same crime. Therefore, it was reasonable for the legislature to draft legislation accordingly.

Turning to the second prong of constitutional analysis, Clinard must demonstrate that the statute is not uniformly applied. However, as the State notes, Indiana Code section 9-30-5-5 is uniformly applied because the disparate treatment hinges on a defendant’s age, which is an easily ascertainable fact. Clinard has not carried the burden of proof, and we grant the legislature its due deference by rejecting Clinard’s contention.

#### V. Ineffective Assistance of Trial Counsel

Clinard is dissatisfied with the representation she received at trial. Specifically, she argues that her attorney provided ineffective assistance (1) at a pretrial conference on March 1, 2006, because counsel was still filling out her appearance form when the conference began, (2) at a pretrial conference on July 5, 2006, because counsel was forty-five minutes late because of “car trouble,” tr. p. 19, (3) by not objecting to the State’s exhibits at trial, and (4) by not providing an adequate legal defense.

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that

counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Finally, if a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

We first note that Clinard does not provide a convincing argument as to how any of her trial counsel's alleged errors prejudiced her at trial. It is difficult for us to understand how the result of Clinard's trial would have been different if her attorney had completed an appearance form before the March conference or had not had car trouble before the July conference. Therefore, we conclude that Clinard has not established prejudice on those counts.

Clinard next contends that her counsel was ineffective because she did not object to the exhibits the State presented at trial. However, as with her previous contention, Clinard does not argue why the exhibits were inadmissible or on what grounds her trial counsel's objections would have been sustained. Therefore, she again fails to demonstrate prejudice.

Clinard argues that her trial counsel "failed to present any defense" related to the blood toxicology and did not proffer a toxicology expert to analyze the test results.

Appellant's Br. p. 10. We initially note that "[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review." Stevens v. State, 770 N.E.2d 739, 747 (Ind. 2002). Because Clinard does not show how a defense toxicologist would have yielded evidence sufficient to undermine the outcome of her case, we cannot find her counsel's strategic decision to be prejudicial.

Finally, Clinard argues that her counsel's errors culminated to render their service ineffective. However, we do not find these alleged errors sufficient to vacate Clinard's conviction because there was sufficient evidence to support Clinard's conviction, as detailed in Part II of this decision. In sum, Clinard does not convincingly argue that but for her trial counsel's alleged errors there is a reasonable probability that the result of her trial would have been different.

## VI. Sentencing

Regarding her sentence, Clinard argues that the trial court (1) improperly conducted the sentencing hearing, (2) improperly determined aggravating and mitigating factors without a jury, and (3) failed to provide Clinard with good time credit while she was under lawful detention and monitoring.

### A. Sentencing Hearing

Clinard claims that the trial court's sentencing hearing violated Indiana Code section 35-38-1-5, which provides:

When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the

defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.

Specifically, Clinard claims that the trial court did not inform her of the jury's verdict and violated her right of allocution by not asking her whether she wished to make a statement before it pronounced her sentence.

We first note that the trial court read Clinard the verdict after the bench trial on July 27, 2006. Tr. p. 197. While the trial court did not reread the verdict to Clinard at the beginning of the sentencing hearing on September 26, 2006, our Supreme Court has held that a defendant "may not sit idly at a sentencing hearing, fail to object to a statutory defect in the proceeding, then seek a new sentencing hearing on that basis on appeal." Angleton v. State, 714 N.E.2d 156, 159 (Ind. 1999). Clinard failed to object at the sentencing hearing; therefore, she has waived this argument.

Waiver notwithstanding, the trial court stated the verdict when pronouncing Clinard's sentence. Tr. p. 262-63. Furthermore, Clinard does not argue that she was unaware of the verdict during the sentencing hearing or that the trial court's delayed pronouncement resulted in prejudice. While we encourage the trial court to clearly pronounce the verdict at the beginning of the sentencing hearing, Clinard does not persuasively argue that she was prejudiced by the trial court's failure to do so herein.

Turning to Clinard's right of allocution, we recognize that Article I, section 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel." Our Supreme Court has held

The Indiana Constitution “places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges.” As the Seventh Circuit has observed, “The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing the defendant a few moments of court time is slight.” United States v. Barnes, 948 F.2d 325, 331 (7th Cir. 1991). Notwithstanding, a defendant claiming that he was denied his right to allocution carries a strong burden in establishing his claim.

Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004) (some internal citations omitted).

We first note that Clinard did not object when the trial court failed to ask her whether she wished to make a statement before pronouncing her sentence. Under those circumstances, our Supreme Court has held that a defendant’s failure to object to the trial court’s failure to provide her this opportunity results in waiver. Angleton, 714 N.E.2d at 159.

Waiver notwithstanding, while the trial court may not have offered Clinard an opportunity to make a statement before pronouncing her sentence, Clinard did testify at the sentencing hearing. Tr. p. 236-49. Clinard testified that she had been trying to overcome her drug addiction at the time of the accident, would make lifestyle changes after serving her sentence, and even made a statement directed at Wethington’s family: “I really am sorry and (witness emotional) I – this was an accident. But I can’t change what happened and I know nothing I can do or say is going to make it better but I am sorry. If I could trade places I would.” Id. at 237-39, 243.

On appeal, Clinard does not identify further statements or arguments she would have made if permitted. Therefore, we cannot conclude that the trial court’s failure to provide her with an opportunity to make a statement before pronouncing her sentence violated her

substantive rights. See Vicory, 802 N.E.2d at 430 (holding that defendant’s right of allocution was not violated at probation hearing where he testified and, on appeal, failed to identify further statements he would have made if provided the opportunity).

## B. Appropriateness

### 1. Amended Sentencing Statutes

Before addressing the merits of Clinard’s arguments, we observe that on April 25, 2005, the General Assembly amended Indiana’s felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an “advisory sentence” somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. When determining the sentence to impose on a defendant, the trial court “may consider” certain enumerated aggravating and mitigating circumstances in addition to other matters not listed in the statute. I.C. §§ 35-38-1-7.1(a) to -7.1(c). Furthermore, the legislature provided that a trial court “may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” I.C. § 35-38-1-7.1(d) (emphasis added).

Here, Clinard committed the crimes and was sentenced after the April 2005 amendment of the sentencing statutes; thus, we will apply the amended versions thereof.<sup>5</sup> In examining the amended sentencing statutes, we conclude that if a trial court chooses to

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<sup>5</sup> Clinard argues that the sentence imposed by the trial court runs afoul of the Blakely rule. As noted above, however, the amended sentencing scheme applies to Clinard. Inasmuch as the amended sentencing scheme was specifically enacted to incorporate advisory sentences rather than presumptive sentences and to comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), we find that the trial court’s actions herein do not implicate Blakely.

impose a sentence greater than the advisory term, it is not required to make findings as to the existence of mitigating or aggravating factors. See id. If it does identify aggravators and/or mitigators, however, the trial court must simply state its reasons on the record for choosing the particular sentence that departs from the advisory term. I.C. § 35-38-1-3(3).

Moreover, under the amended sentencing scheme, a defendant may no longer claim that a trial court abused its discretion under statutory guidelines in imposing the sentence. Inasmuch as we can no longer reverse a sentence because a trial court improperly found and/or weighed aggravating and mitigating circumstances, our review is now confined to an analysis under Indiana Appellate Rule 7(B): “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” We also observe, however, that we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

## 2. Appropriateness of Sentence

Clinard challenges the trial court’s imposition of a fifteen-year sentence with five years suspended to probation. Because the amended sentencing statutes apply to Clinard, as previously explained, we will review Clinard’s sentence pursuant to Indiana Appellate Rule 7(B).

The amended sentencing statutes provide that for a class B felony, a person “shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Ind. Code § 35-50-2-5. Sentence review under Appellate Rule 7(B) is very deferential to the trial court’s decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, Clinard chose to endanger her own life and the lives of countless innocent citizens by driving on the interstate while under the influence of illegal narcotics. Clinard admitted to a police officer that she had used methamphetamine the day before the accident, and blood test results showed that she also had four other types of narcotics in her system. Clinard’s illegal actions resulted in the death of Wethington, a woman with seven grandchildren and three great-grandchildren, who was driving on the interstate shortly before noon when Clinard caused the accident that took her life. Five of Wethington’s relatives testified at Clinard’s sentencing hearing, including Beverley Best, Wethington’s daughter, who stated that her mother “was everything to us.” Tr. p. 208. In sum, we do not see how the nature of the offense aids Clinard’s argument that her sentence is inappropriate.

Turning to her character, we note that Clinard has a previous misdemeanor conviction for possession of marijuana, which the trial court properly considered to be an aggravating

factor. Although we recognize that Clinard's criminal history is minimal, her decision to continue to use drugs after her prior drug-related conviction demonstrates her substance abuse problem and her failure to lead a law-abiding life. Furthermore, Clinard's substance abuse issue has escalated from a personal problem to a problem affecting others that, ultimately, resulted in the death of an innocent civilian. In sum, based on the nature of the offense and her character, we cannot conclude that Clinard's sentence was inappropriate.

### C. Good Time Credit

Finally, Clinard argues that the trial court erred by denying her good time credit for the time she served on home detention and electronic monitoring prior to trial. Although Clinard received credit for the 294 days she spent on home detention prior to trial, she argues that the trial court abused its discretion by not awarding her good time credit.

Indiana Code section 35-50-6-3 reads, in pertinent part, that “[a] person ... earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing.” In Purcell v. State, our Supreme Court provided that “credit for time served” is the credit toward the sentence a prisoner receives for time actually served and “good time credit” is the additional credit a prisoner receives for good behavior and educational attainment. 721 N.E.2d 220, 222 (Ind. 1999). Our Supreme Court has held that

a trial court is within its discretion to deny a defendant credit toward sentence for pre-trial time served on home detention. Absent legislative direction, we believe that a defendant is only entitled to credit toward sentence for pre-trial time served in a prison, jail or other facility which imposes substantially similar restrictions upon personal liberty.

Purcell v. State, 721 N.E.2d 220, 224 n.6 (Ind. 1999). In Wilkie v. State, we held that a trial court did not abuse its discretion when it denied credit time to a defendant who was confined in home detention awaiting trial. 813 N.E.2d 794, 805 (Ind. Ct. App. 2004).

Clinard argues that, for all intents and purposes, she was in a facility that imposed restrictions on her personal liberty while she was on home detention because she was electronically monitored. Consequently, Clinard argues that not only should she have received the credit time that the trial court awarded her, she should have received good time credit as well. While Clinard's home detention may have restrained her liberty, she still enjoyed the personal effects of her home, including her bed, shower, and general privacy. In light of our previous ruling that it would not have been an abuse of discretion for a trial court to deny credit to a defendant on pretrial home detention, id., we certainly cannot determine that the trial court here abused its discretion when it did not award Clinard good time credit for her pretrial home detention. Therefore, Clinard's argument fails.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate Clinard's class C felony OWI resulting in death conviction.

FRIEDLANDER, J., and CRONE, J., concur.